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In the Supreme Court
of the United States

TERM: OCTOBER, 1995

LIBERTY NATURAL PRODUCTS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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May 17, 1996.

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QUESTIONS PRESENTED

1. To what extent are a non-union employer's First Amendment speech rights protected under Section 8(c) of the National Labor Relations Act when unfair labor practices are alleged?

2. To what extent does socially intolerable misconduct targeted towards minority employees provide basis for discharge of an employee and bar reinstatement of the employee who had participated in employee activities covered by the National Labor Relations Act?

3. Do the Board's case by case adjudications satisfy the "rule making" or "adjudication" requirements of the Administrative Procedure Act and The National Labor Relations Act in cases where non-union employees participate in self-organization activities on employer work time?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The parties in the National Labor Relations Board proceedings were the individual complainants, Jerry J. Smith, Heather Crumbaker and Kelli A. Cunningham and the National Labor Relations Board was the respondent and cross-petitioner in the Ninth Circuit Court of Appeals.

Liberty Natural Products, Inc. was the respondent in the National Labor Relations Board proceedings was the Petitioner, Cross Respondent, in the Ninth Circuit Court of Appeals.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

LIBERTY NATURAL PRODUCTS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Liberty Natural Products, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on February 22, 1996.

OPINIONS BELOW

The opinion of the National Labor Relations Board is reported as Liberty Natural Products, Inc., and Jerry J. Smith, et al., at 314 NLRB No. 102, p. 1-12 and is reprinted in App. C hereto.

The memorandum decision of the Ninth Circuit Court of Appeals is unreported and is reprinted in App. B hereto.

JURISDICTION

The petitioner invoked 29 U.S.C. § 160(f) in petitioning the Ninth Circuit Court of Appeals for review of a final order of the National Labor Relations Board (Board) under 29 U.S.C. § 160.

On petitioner's appeal, the Ninth Circuit, on February 22, 1996, entered an order denying petitioner's petition for rehearing, which is reprinted in App. A.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED.

The pertinent provisions of the First and Fifth Amendments of the United States Constitution, Administrative Procedure Act, 5 U.S.C. § 553(b), the National Labor Relations Act, 29 U.S.C. §§ 141, 151, 152(11), 157, 158, 160, 160(f).

STATEMENT OF THE CASE

An unfair labor practice charge pursuant to the National Labor Relations Act (hereinafter "Act" was filed with the National Labor Relations Board (hereinafter the "Board") against Liberty Natural Products, Inc., including James R. Dierking its owner and president (hereinafter "Liberty" or "employer") by three employees, Jerry Smith, Heather Crumbaker and Kelli Cunningham. (App.C-10)

In August 1991, Liberty's place of business was totally destroyed by fire. Appendix (App.C-18). Liberty is a small non-union business. Limited finances necessitated Liberty's President to personally renovate an old building,

rebuild equipment and design and install a new computer network application in order to restore Liberty's operational capabilities and become competitive. (App.C-19). Because of time limitations, needed organization, personnel and system changes remained to be completed on December 2, 1992.

On December 2, 1992, nine of Liberty's 14 employees including complainants, Heather Crumbaker and Kelli Cunningham participated in employee self organization activities to discuss employee concerns. The participating employees initiated a petition requesting Liberty's president to address employee concerns that pay checks be issued on the last day of each pay period and to answer their general complaints about the level of pay received. (App.C-16). Complainant, Jerry Smith second in Liberty's management was supervising operations on December 2, 1992. (App.C-26).

In response to the employees' petition, Liberty's president contacted each of the participating employees excepting Crumbaker to learn about the petition. Excepting three employees, the other employees had participated in the petition activities while working and without checking out under Liberty's computer time check out rules. Based on the Administrative Law Judge's (hereinafter "ALJ") finding, most of the participating employees engaged in the activities from 15 to 30 minutes without checking out under Liberty's work and pay rules. (App.C-55). Liberty's employees were concerned with need to effect paycheck issuing procedures and to make organizational changes in order to meet payroll and remedy cash flow problems.

The ALJ made two additional findings that the complainant, Crumbaker offended two black female co-workers with insensitive and racist remarks. (App.C-21, 38). Three employees who were assigned supervisory functions were were involved in the petition activities but Liberty's evidence of their supervisory functions was refused by the ALJ. (App.D-21-27).

In the individual meetings with participating employees, Liberty's president in essence explained that employees rights to participate in self-organization activities were not affected but employees were required to comply with Liberty's work check out rules when they were involved in the self organization employee activities. (App.D-9-11; 16-17). After meeting with the employees, the issuance of pay checks on the last day of the pay period was found not to be feasible. Instead, the pay date policy was modified to allow the holiday paychecks in question to be paid at an earlier date. To meet payroll and operational concerns the entire senior sales staff, consisting of the three complainants were discharged. (App.D-16, 28). In response to complaints of African-American employees and due to concern with continued racial harassment if the offending employee was reinstated, the Equal Employment Opportunity Commission (EEOC) was requested to investigate and take action. (App.D-18, 19). Liberty's president also completed a single pay raise commitment to Rawlinson a participant in the employee petition activities who testified in the Board's proceedings that she knew that she had earned a pay increase prior to the day of the petition activities. (App.D-9, 10).

The Oregon Employment Division, in contested unemployment compensation proceedings, determined that Jerry Smith had been discharged for economic reasons as Smith had testified in the Oregon case. (App.D-12-15).

In Heather Crumbaker's case, the Oregon Employment Division decided that she had been discharged for cause for willful misconduct rather than for economic reasons. (App.D-7, 28).

The Board adopted the recommended Order of the Administrative Law Judge dated February 25, 1994 and issued its decision and order on July 29, 1994, finding that Liberty had engaged in unfair labor practices. (App.C-1). The Board ordered Liberty to cease and desist from: discharging a statutory supervisor for failing to commit unfair labor practices; interrogating employees concerning their protected concerted protected activities in the future; and interfering with employees' rights under Section 7 of the Act, and required reinstatement of the discharged employees with back pay for lost earnings. (App.C-7).

Liberty timely filed a petition for review on August 18, 1994. The Ninth Circuit Court of Appeals issued an unpublished memorandum decision entered on December 20, 1995. (App.B-1). The Ninth Circuit held: (1) that the employees activities on December 2, 1992 were protected activity and that Crumbaker's and Cunningham's discharges violated § 8(a)(1); (2) Crumbaker was not a supervisor exempted under § 7 of the Act; and that the discharge of Smith, a statutory supervisor

under § 8 of the Act, violated § 7 of the Act. (App.B-1-5). Liberty timely filed a petition for rehearing and suggestion for rehearing in banc on January 23, 1996. On February 22, 1996, the Ninth Circuit filed its Order denying petition for rehearing and rejected the suggestion for rehearing in banc. (App.A).

REASONS FOR GRANTING THE WRIT

A. The Act's Terms for Balancing Employer First Amendment Speech Rights and Employer Work Rules In Relation to Self-Organization Employee Activities While Working, Are Undefined, and The Law on the Discharge of Employees for Socially Intolerable Misconduct Affecting Other Employees' Civil Rights, is Unsettled.

As the Nation faces a new century, this Court again is presented with need to implant constitutional standards and common sense in the Board's balancing of employees' and employers' rights to give the Act's terms real meaning in prescribing rights of non-union small businesses where employees engage in self organization activities while in a work and pay status without complying with employer rules.

Just two years ago, this Court admonished the Board concerning proper definition and operation of the Act with respect to supervisory employees. N.L.R.B. v. Health Care & Retirement Corporation of America, _____ US _____, 114 S.Ct. 1778, 1782 (1994). This Court noted a similarity in the Board's approach that was previously rejected by this Court's ruling in NLRB v. Yeshiva Univ., 444 U.S. 672 (1980). This Court held that, as in Yeshiva, the Board

had created a false dichotomy, a dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer. Under this Court's ruling in Yeshiva and, more recently in NLRB v. Health Care, the Board must follow the terms of the Act and refrain from initiating legal categories inconsistent with the Act's meaning.

In Liberty's case, the Board resurrected questions over the Act's supervisory terms by disregarding Liberty's claim that its interests and rights were affected by participation of employees with supervisory functions in the employee petition activities on December 2, 1992. The Administrative Law Judge adamantly refused repeated offers of proof of supervisory participation in the self organization petition activities. (App.D-21-25). In this manner, both the Board and the Ninth Circuit in disregarding the Act's supervisory restrictions created confusion between acts taken by supervisors in the guise of employee initiated activities which conflicted with the bona fide employer interests. This new false dichotomy now engrafted by the Board into nonunion company activities is the kind of dichotomy rejected by this Court. N.L.R.B. v. Health Care & Retirement Corporation of America, supra, 114 S.Ct. at 1782.

More importantly, the Board and the Ninth Circuit in conflict with this Court's and the Ninth Circuit's rulings disregarded Liberty's First Amendment claim to express opinions concerning employee petition activities in relation to compliance with employer work rules. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1962); R.A.V. v.

City of St. Paul, Minnesota, 505 US 377 (1992); Rosenberger v. Rector & Visitors of Univ. of Virginia, 115 S.Ct. 2510 (1995); UAW v. N.L.R.B., 834 F.2d. 816 (9th Cir. 1987). Here, the president of this small, non-union company undertook a team approach to try and resolve the issues presented to the company through the employee petition. The sharing of opinions between employer and employees involved a genuine give- and-take attitude in this small company, as evidenced by the record. (App.D-16-17). Yet, the Board and the Ninth Circuit, completely ignoring the employer First Amendment Claims, in effect, rules it illegal for management to share any decision-making opinions or power with its employees in attempting to resolve the important work place issues presented by the petition. Such as been an all to frequent and unbridled pattern on the part of the Board.

The Board also disregarded Liberty's claim that business reasons, including socially intolerable conduct specifically targeted at minority employees, were substantial or motivating factors for the discharges of the offending employee under the Board's tests in Wright Line, 251 NLRB 1083 (1980) as approved in by this Court in NLRB v. Transportation Management Corp., 462 US 393 (1983). By completely disregarding this important social factor, based on the finding of the ALJ concerning Crumbaker's racially insensitive remarks (App. C-21, 38) the Board transmitted a message to the Nation's employers and employees which contradicts the purpose of the Act - "to prescribe the legitimate rights of both the employers and employees in their relations affecting commerce." 29 U.S.C. § 141.

Consequently, this Court is presented with a conflict between other circuits and the Ninth Circuit's disregard of socially intolerable conduct as a factor in employee discharge and reinstatement in cases where protected employee activities are implicated. The Seventh Circuit has held that "socially intolerable" or flagrant behavior are substantial or motivating factors to be balanced within the context of the discharge of employees who participated in protected activities. NLRB v. Thor Power Tool Company, 351 F.2d 584, 587 (7th Cir. 1965). Similarly, the Fifth Circuit applies the balancing tests and has ruled that Congress did not intend for the Act "to provide a shield for the incompetent or job security for the unworthy." TRW, Inc. v. NLRB, 654 F.2d 307, 321 (5th Cir. 1981).

Also, the Board's decision in Liberty's case conflicts with prior Board decisions. In Marico Enterprises, 283 NLRB 726, 732 (1987), the Board held that although the General Counsel sustained its preliminary burden under the Wright Line test, the employer met its burden of proving that the employee, who engaged in egregious conduct and profanity, would have been discharged even absent the employee's participation in concerted activity.

The Board's decision causes further conflict and uncertainties with the Act's terms by disregarding the work rules of America's small non-union businesses. Small business employers comprise an important part of the Nation's commerce. In conducting business, employers must necessarily promulgate work and pay rules consistent with federal and state laws that bar discriminatory conduct in the workplace and

which regulate pay, hours, safety, workers and unemployment compensation, and virtually all other facets of doing business. When the Board summarily ignores federal and state workplace rules, it places the terms of the Act in conflict with small businesses. The Act and this Court's decision mandate a more careful balancing of employer with employee interests. Beth Israel Hospital v. NLRB, 437 US 483, (1978). N.L.R.B. v. Health Care & Retirement Corporation of America, supra, 114 S.Ct. at 1782.

In the absence of published NLRB regulatory criteria, union or other agreements governing employee use of work time and work areas for self-organization activities, the rules of small business non-union employers are the key for maintaining order and relations under the Act. However, as revealed in Liberty's case the Board's discretionary case by case approach rejects employer rules and leaves America's employers and employees without the certainty of defined rules for maintaining order in the workplace, as intended by the Act.

Although this Court in ABF Freight System, Inc. v. National Labor Relation Board, ____ US _____, 114 S.Ct. 835 (1994) strongly supported policy not to divert the Board away from its primary mission, the Court's ruling did not contemplate the Board completely circumventing legitimate employer rules by creating legal categories inconsistent with the Act.

The singular and cumulative effect of the Board's failure to apply the balancing tests in Beth Israel Hospital v. NLRB,

supra, 437 US 483 to each of Liberty's claims, has, in effect, deprived Liberty of First Amendment right to speech. Such failure to balance the competing interests of employer and employee by the Board and Ninth Circuit fails to meet the due process procedural standards under this Court's tests announced in Mathews v. Eldridge, 424 US 319, 335 (1976).

B. Liberty's Response to the Employees' Petition and Expressions Concerning Employee Compliance with Company Work Check Out Rules Were Protected First Amendment Expressions.

Liberty raised its First Amendment speech claim in both the Board's and Ninth Circuit's proceedings. (App.E-1-3). This pivotal claim was ignored by both the Board and the Ninth Circuit. In failing to address Liberty's claim that its post petition expressions and opinions shared with employees was predicated on speech under the Ninth Circuit's rulings in UAW v. N.L.R.B., supra, 834 F.2d. at 816, 820, 822, 823, the Board and Ninth Circuit completely failed to subject the alleged unfair labor practices to the careful scrutiny test formerly adopted by the Ninth Circuit. This judicial evasion deprived Liberty of a form of First Amendment expression that was permissible and protected speech under Section 8(c) of the Act.

This Court, within the context of a union shop, has affirmed an employer's right to freely "communicate to union employees any of his general views about unionism or any of his specific views about a particular union, so long as the communi-

cations do not contain a 'threat of reprisal or force or promise of benefit." NLRB v. Gissel Packing Co., supra. 395 U.S. at 618.

The Court has not, as yet, defined the scope of permissible government control of a non-union employer speech within the context of protected activities under the Act. In R.A.V. v. City of St. Paul, Minnesota, supra, 112 S Ct. at 2542, this Court reviewed the validity of an ordinance and held that the First Amendment generally prevents government from proscribing speech, Cantwell v. Connecticut, 310 U.S., 296, 309-311 (1940), including expressive conduct or ideas which the government disapproves. Texas v. Johnson 491 US 397, 406 (1989). Content-based regulations have been held to be presumptively invalid. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 112 S.Ct. 501, (1991).

In Rosenberger v. Rector & Visitors of Univ. of Virginia, supra, 115 S.Ct. at 2516-17, this Court provided tests for impermissible viewpoint discrimination and again held that the government may not impose impermissible discrimination against the specific motivating ideology, opinion, or perspective, which is presumed impermissive when directed against speech otherwise within the forum's limitations.

In Liberty's case, under this Court's recent tests, the Board's ruling restricted the content of the communications of Liberty's president to employees concerning use of Liberty work time for employee self-organization activities and need to comply with Liberty's checkout rules. The Board

did not provide an alternative channel of communications for Liberty to respond to the employees' petition which invited Liberty to take action.

The Board's speech restrictions in Liberty's case constitute impermissible viewpoint discrimination rejected by this Court in Rosenberger v. Rector & Visitors, Univ. of Virginia, supra, 115 S.Ct. at 2516. In Liberty's case, the Board's restrictions equate with impermissible discrimination against the specific motivating ideology, opinion, or perspective espoused by Liberty's president concerning work rules and requirements for employees to check out when participating in employee activities. The Board's decision impermissibly presumed that the expressions and opinions of Liberty's constituted per se threats and illegal interrogation under the Act.

This holding creates the type of false dichotomy between the Board's rulings and the Act which has been disapproved by this Court. N.L.R.B. v. Health Care & Retirement Corporation of America, supra, 114 S.Ct. at 1782.

The record established that the ALJ and Board's decisions completely disregarded the circumstances existing at the time when Liberty's president contacted employees in response to their petition. Liberty had experienced no prior labor conflict. Finances were a critical concern at the time of the employee activities on December 2, 1992. Liberty's and equipment had been destroyed by fire in 1991. (App.C-18). Six of the nine participating Liberty employees accomplished their self-

organization petition activities while in a working status and receiving pay from Liberty at a time when Liberty was experiencing critical cash flow problems. (App.D-15). Fear of the inability to meet payroll and reorganization were on the minds of Liberty's employees. (App.D-1).

What was not known to the employer was whether there were other underlying employee concerns, whether the petition was completed while employees were in a working and pay status, whether employees had checked out under Liberty's rules and how much time was taken. In contacts with employees, Liberty's president assured petition signers that no reprisals would be taken. (App. D-10, 11, 16-17). Then, Liberty's president stated his views, expressing the requirements for employees to check out when they engaged in employee self-organization activities. (App.D-19).

The comments of Liberty's president concerning Liberty's rules were protected speech under the First Amendment because they were responsive to the employees' petition and the expressions embodied reasonable business reasons needed to prevent waste of Liberty funds during a financial crisis. The Board and Ninth Circuit failed to balance the interests and to employ the test of reasonableness fashioned by this Court in scrutinizing employer investigations of union activities. See NLRB v. Gissel Packing Co., supra, 395 US at 609. Here, Liberty's communications in no way restricted employees' rights to participate in future activities except that employees would be required to check out under Liberty's rules.

In these circumstances, Liberty's expressions concerning requirement to comply with work check out rules while employees participated in concerted employee activities and in completing a prior pay raise commitment are protected First Amendment speech and did not constitute an interrogation or threat to employees concerning their protected concerted activities. NLRB v. Gissel Packing Co., supra.

C. Employee Misconduct in Making Racial Slurs to Minority Employees Provided A Substantial or Motivating Factor for the Employee's Discharge and the Board's Order to Reinstate the Employee Was Inconsistent With the Act.

This Court in ABF Freight System, Inc. v. National Labor Relations Board, supra, 114 S.Ct. at 839, upheld the reinstatement with back pay of an employee who had been discharged for intolerable misconduct in making false statements in formal proceedings. This Court noted, however, that "Only in case of discharge for cause does the statute restrict the Board's authority to order reinstatement." Supra, 114 S.Ct. at 839.

In Liberty's case, one black employee testified in the proceedings before the ALJ that Crumbaker, one of the complainants, had made slurs to her including "black women being on assistance." Another employee testified that he heard Crumbaker had made slurs such as "dumb nigger" towards black employees. (App.D-20, 21, 26).

Based upon such testimony, the ALJ made two findings defining the racist nature of Crumbaker's remarks directed to two Liberty black employees:

> "Crumbaker **** offended two black female coworkers with insensitive and racist remarks." (App.C-21, 22).
>
> "when Dierking inquired of both, who were black women, whether Crumbaker had ever been discriminatory toward them, both responded affirmatively ****. (App.C-38).

"Despite this finding, and despite the Oregon Employment Division's finding that Crumbaker's termination was for cause, the ALJ and Board made no finding as to whether the misconduct violated public policy to such an extent that her discharge was consistent with the Act's terms or that her reinstatement would bring the Board into conflict with the Act's policy to promote commerce or other public interests, such as the promotion of racial harmony.

Crumbaker's racial slurs obviously exceeded the bounds of decency and "give and take" under the Board's tests in Wright Line, 251 NLRB 1083 (1980), as approved by this Court in NLRB v. Transportation Management Corp., 462 US 393 (1983).

Nothing in this Court ruling in ABF Freight System, Inc. v. National Labor Relations Board, supra, in anyway suggests that the Board in Liberty's case could simply disregard the impact of employee misconduct affecting minority employees' rights when assessing the employer's

motivation for the employee's discharge for cause.

In ordering Crumbaker's reinstatement, the decisions of the Board and Ninth Circuit conflict with this Court's ruling in McKennon v. Nashville Banner Publishing Co. ___ US ___ , 115 S.Ct. 879, 130 L.Ed.2d. 852 (1995). In the McKennon case, this Court held that after--acquired evidence of a discharged employee's wrong--doing must be taken into account in determining the specific remedy, where the employee had been discharged in violation of the Age Discrimination in Employment Act of 1967. This Court ruled that as a general rule, reinstatement with pay is not an appropriate remedy because it would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate. Supra, 115 S. Ct. at 886. Under the McKennon tests, the employer must show "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." Supra, 115 S. Ct. at 886, 887. The severity of Crumbaker's wrongdoing in justifying discharge is made self-evident by her remarks and the findings of the ALJ. Information of this specific wrongdoing came to Liberty's attention either on the day of the employee's discharge or several days thereafter when Liberty's president interviewed the two black employees. Crumbaker is entitled to no remedy under the McKennon case ruling.

For the above reasons, the decision of the Board and Ninth Circuit to disregard and repress substantial claims in Liberty's

case concerning the socially intolerable conduct of an employee which resulted in her discharge for cause, was arbitrary, capricious, and manifestly contrary to the Act. ABF Freight System, Inc. v. National Labor Relation Board, supra, 114 S.Ct. at 839.

D. The Board's Case by Case Adjudication Has Failed to Satisfy "Rule Making"or "Adjudication" Requirements of the Administrative Procedure Act and National Labor Relations Act in Cases Where Employees Participate in Non-Union Self-Organization Activities on Employer Work Time.

Under this Court's ruling in NLRB v. Wyman-Gordon Co. 394 U.S. 759 (1968), deference has been given to the informed discretion of the NLRB to choose between proceeding by general rule or by adjudication.

This Court has established bounds for the Board's use of discretion and requires that Board actions must satisfy the definition of either rule making or adjudication under both the Administrative Procedure Act and the Labor Relations Act. NLRB v. Wyman-Gordon Co., supra, at 772.

Section 1 of the National Labor Relations Act, 29 U.S.C. 141 provides:

> "It is the purpose and policy of this Act in order to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor

organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

In Liberty's case the ALJ and the Board extended the Act's protection to non-union employee self-organization activities on Liberty work time without need for the employees to comply with Liberty's check out rules.

The Board's decision in Liberty's case did not "define and proscribe" employer and employee practices as Congress intended. Emergency or nonemergency circumstances where employees may stop or interrupt ongoing work to participate in self-organization activities, are not defined. The amount of work time that employees may use when participating in self-organization activities is not defined or proscribed by guidelines. No guidelines for small non-union businesses have been provied to guide employees who seek to cooperatively resolve important work place issues presented by workers. No guidelines are provided for employee alternatives to use nonproduction work areas, or check out procedures which avoid disputes over the use of employer production work areas and work time for employee concerted activities.

In Liberty's case, the Board's and Ninth Circuit's decisions fail to provide any definitions of non-union employee and employer rights and practices under the Act

sufficient to meet either the adjudication standards or requirements for publication of rules in accordance with the Act and the Administrative Procedure Act, 5 U.S.C. 553(b).

CONCLUSION

The net effect of the Board's failure to balance employer interests with employee interests under the Act constitutes a deprivation of employers' First Amendment speech and property rights in violation with the Fifth Amendment while also violating the small business rights to procedural due process. Mathews v. Eldridge, supra, 424 US 319, 335.

This petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LIBERTY NATURAL PRODUCTS INC., Petitioner,	No. 94-70489
v.	ORDER
NATIONAL LABOR RELATIONS BOARD, Respondent.	
NATIONAL LABOR RELATIONS BOARD, Petitioner,	No. 94-70619 NLRB Nos. 36-CA-6984 36-CA-6986 36-CA-6987
v.	
LIBERTY NATURAL PRODUCTS INC., Respondent.	

Before: BROWNING, RYMER and T.G. NELSON, Circuit Judges.

The panel has voted to deny petitioner/cross-respondent Liberty natural Products, Inc., petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the

suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIBERTY NATURAL PRODUCTS INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	No. 94-70489
	)	MEMORANDUM*
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. LIBERTY NATURAL PRODUCTS INC., Respondent.	)	No. 94-70619
	)	NLRB Nos. 36-CA-6984 36-CA-6986 36-CA-6987

Petition for Review of their
Order of the national Labor Relations Board

Submitted November 15, 1995**
Portland, Oregon

Before: BROWNING, RYMER and T.G. NELSON, Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except a provided by Ninth Circuit Rule 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. p. 34 (a) and Ninth Circuit Rule 34-4.

Since the parties are familiar with the facts, we need not recite them here.

I. National Labor Relations Act ("Act"), 29 U.S.C. § 157.

The petition activity was clearly a protected activity. Shelly & Anderson Furniture Mfg. Co., Inc. v. NLRB, 497 F.2d 1200, 1202-03 (9th Cir. 1974). The purpose of the petition was to let management know that the employees were dissatisfied with Liberty's paycheck distribution policy and with their wages. Therefore, Liberty's discharge of Crumbaker and Cunningham was a prima facie violation of § 8(a)(1). Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1507 (9th Cir. 1993).

The Board held that Liberty's proffered reasons for discharge were merely pretextual. "[T]he trier of fact may infer motive from the total circumstances proved." Shattuck Denn Mining Corp. v.

NLRB, 263 F.2d 466, 470 (9th Cir. 1966). Of all the employees who signed the petition, only Cunningham and Crumbaker were discharged. Further, several other petition signers who apologized to Deirking (sic) for the petition were given pay raises. Under the circumstances, the Board's determination that Liberty's discharge of Crumbaker and Cunningham wa a violation of § 8 is supported by substantial evidence.

II. Statutory Supervisor

Under § 2(3) of the Act, supervisors are not protected under § 7 of the Act. Although Crumbaker may have exercised supervisory type authority in carrying out some of her duties, "the existence or exercise of any such powers must be more than merely routine or clerical in nature." NLRB v. S.R.D.C., Inc., 45 F.3d 328, 332 (9th Cir. 1995). The determination that

Crumbaker possessed no supervisory authority is supported by substantial evidence.

III. Smith

Generally, § 8 of the Act does not protect supervisors engaging in § 7 protected concerted activities. However, '[t]he discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act...." Parker-Robb Chevrolet, Inc. v. Automobile Salesmen's Union, Nos. 32-CA-2644 and 32-RC-1044, 1982 WL 90211, *3 (N.L.R.B. June 23, 1982). Smith's termination notice stated that Smith was being discharged for "failure to timely notify management of inappropriate employee activity on company time and on company premises." The Board's determination that Smith's discharge was in violation of § 8 is supported by

substantial evidence.

IV. Interrogation

During Dierking's interrogations of the employees who signed the petition, he questioned them about the roles Crumbaker and Cunningham played in the petition activity, and expressed his disappointment with the employees for the petition. Dierking also inquired of their reasons for signing the petition and solicited their apologies for participating in the petition activity. Dierking's interrogations were coercive and intimidating and were in violation of § 8. L'eggs Products, Inc. v. NLRB, 619 F.2d 1337, 1345 (9th Cir. 1980).

V. CONCLUSION

Liberty's petition for review DENIED, and NLRB's petition for enforcement of the NLRB order GRANTED.

APPENDIX C

Liberty Natural Products, Inc. and Jerry J. Smith and Heather Crumbaker and Kelli A. Cunningham. Cases 36-CA-6984, 36-CA-6986, and 36-CA-6987

July 29, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On February 25, 1994, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel filed a limited exception and a brief in support of the judge's decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the

judge's rulings, finding,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

The General Counsel has excepted to the judge's finding that the General Counsel failed to prove that Don Hatter was a statutory supervisor and to the judge's failure to find that remarks made by Hatter to employees violated Section 8(a)(1) of the Act as alleged in the complaint. We find merit in the General Counsel's exception.

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[1]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2]We shall modify the judge's recommended Order and substitute a new notice to more closely reflect the violations found.

Paragraph 3(a) of the complaint alleges, inter alia, that at all material times, Operations Manager Don Hatter was a statutory supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act. The Respondent in its answer admitted this allegation.[3] At no time did the Respondent retract its

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[3]Par. 3(a) of the complaint also alleges the supervisory status of President and owner James Dierking, and Vice President Jerry Smith. The Respondent's answer states in pertinent part as follows: "Admits Paragraph 3(a), but denies allegation to the extent that it my [sic] exclude employees who may be in a professional or managerial positions [sic] within the meaning of Section 2(11)."

We construe the Respondent's answer as an ambiguous admission of the supervisory status of Hatter, Dierking, and Smith, and as a claim that the list may not be exhaustive, i.e., that there may be others occupying positions falling within the definition set forth in Sec. 2(11) of the Act. In this connection, we note that, consistent with our reading of its answer, at the hearing the Respondent took the position that Charging Party Heather Crumbaker was a statutory supervisor.

admission. The issue was not litigated at the hearing because the General Counsel was entitled to rely on the Respondent's admission. See Bogart Industries, 196 NLRB 189 (1972), enfd. in relevant part 485 F.2d 1203 (5th Cir. 1973). Accordingly, we find, contrary to the judge, that Hatter was a statutory supervisor at all material times.

Turning to the merits, the record shows, and the judge found, that on December 2, 1992, the Respondent's employees were talking among themselves about the unfairness of the Respondent's policy of not giving employees their paychecks until 3 business days after the close of the pay period. Charging Party Heather Crumbaker suggested to other employees that a petition be given to President Dierking. Crumbaker then prepared the petition, showed it to the other employees who signed it, and

left it in Dierking's office. The petition, which is quoted in the judge's decision, expressed the employees' discontent with the Respondent's payroll policy and salary levels.

The following day, employees Victoria Rawlinson and Lisa Dokas were taking about the petition when Operations Manager Hatter approached and shouted at both women, while pointing his right finger for emphasis, "That was very stupid of you to sign that petition! You should know better than that."

The judge found, and we agree, that the preparation, circulation and signing o the employee petition constituted protected concerted activities.[4] Therefore, we con-

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[4]In affirming the judge's finding that the employe activity in issue here was concerted within the meaning of the act, Chairman Gould and Member Browning decline to rely on and question the continuing vitality of, Meyers Industries, 268 NLRB 493 (1984), remanded sub nom. Prill v.

clude that Hatter's angry expression of displeasure with the two employees for signing the petition violated Section 8(a)(1) of the Act because it would reasonably cause them to fear future reprisal for engaging in such activities.

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 5, and renumber the subsequent paragraph.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Liberty Natural Products, Inc., Portland, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986), affd. sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. 1987), cert. denied 487 U.S. 1205 (1988).

1. Substitute the following for paragraph 1(c).

"(c) Interrogating employees concerning their protected concerted activities and threatening them if they seek to engage in protected concerted activities in the future."

2. Substitute the following for paragraph 2(a).

"(a) Offer Heather Crumbaker, Kelli Cunningham, and Jerry Smith immediate full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 19, 1994.

William B. Gould IV, Chairman

James M. Stephens Member

Margaret A. Browning, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees for concerted activities protected by Section 7 of the Act.

WE WILL NOT discharge our supervisors for refusing to commit unfair labor

practices.

WE WILL NOT interrogate or threaten employees for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Heather Crumbaker, Kelli Cunningham and Jerry Smith immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference

to their discharge and that we will not use the discharge against them in any way.

LIBERTY NATURAL PRODUCTS, INC.

Linda Scheldrup, Esq., for the General Counsel.

James Dierking, President, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Portland, Oregon, on August 19-20 and September 8-9, 1993,[1] pursuant to a consolidated complaint issued by the Regional Director for the National Labor Relations Board for Region 36 on March 1, 1993, and which is based on charges filed by Jerry J. Smith (Case 36-CA-6984), Heather Crumbaker (Case 36-CA-6986), and Kelli A. Cunningham (Case 36-CA-6987) (Charging Parties, Smith,

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[1]All dates herein refer to 192 unless otherwise indicated.

Crumbaker, or Cunningham, respectively) on January 11, 1993 (Case 36-CA-6984) and January 20, 1993 (Case 36-CA-6986, 6987). The complaint alleges that Respondent Liberty Natural Products, Inc. (Respondent) has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (Act).

ISSUES

(1) Whether Respondent discharged its employees Heather Crumbaker and Kelli Cunningham because they engaged in certain concerted protected activities involving an employee petition.

(2) Whether Respondent discharged its supervisor Jerry J. Smith because he failed to prevent the concerted protected activities referred to above and to discourage employees from engaging in such concerted protected activities.

(3) Whether Respondent acting through its owner, supervisor and/or agent interrogated and threatened its employees in retaliation for the employees concerted protected activities, referred to above.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

1. RESPONDENT'S BUSINESS

Respondent admits that it is an Oregon corporation, engaged in the manufacturing and distribution of health and beauty aids and having an office and place of business

located in Portland, Oregon. Respondent further admits that during the past 12 months, which period is representative of all material times, in the course and conduct of its business operation, it had gross sales of goods and services valued in excess of $250,000. It further admits that during the past 12 months, which period is representative of all material times, in the course and conduct of its business, it has sold and shipped goods or provided services from its facilities within the State of Oregon, to customers outside the state, or sold and shipped goods or provided services to customers within the state, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of $50,000. Accordingly, it admits and I find that it is an employer engaged in commerce within the meaning of Section

2(2), (6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Overview

In December, respondent's paydays for nonsupervisory employees were December 3 and 18. (R. Exh. 5).) However, employees did not receive their checks on these days, nor on the two comparable designated paydays for other months. Instead, employees received their paychecks 3 business days after they were due pursuant to Respondent's payroll policy providing for late payment of wages.[2] Where a holiday combined with a weekend, employees received their checks 6 days after they were due. Many of Respondent's employees objected to

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[2]Sometime after charges were filed in this case, Respondent changed its payroll policy. Currently, employees are paid on the 3rd and 18th of each month, if they fall on business days, or on the next business day, if the payday falls on a weekend day. (Tr. 645-646).

this payroll policy and some or all of the same employees believed themselves to be underpaid as well. Both issues spontaneously arose on the morning of December 2, a Wednesday, as some employees began to talk among themselves during worktime about the approaching holidays and the resulting expenses. It was felt that Respondent's payroll policy would cause needless hardship because bills had to be paid on time without the luxury of employees delaying 3 business days while they waited for their paychecks. Accordingly, an employee named Heather Crumbaker suggested to other employees an employee petition to their superior, James R. Dierking, president and owner of Respondent. Crumbaker prepared a suggested petition on her word processor and showed it to other employees including Kelli Cunningham, Gloria Streeter, Lisa Dokas, and Dokas' mother,

Maureen Richey. No one objected to the wording of the petition as proposed by Crumbaker. All of the aforementioned employees and all or most other available non-supervisory employees who had not been part of the initial discussion signed the petition. It reads as follows (Jt. Exh. 3):

PETITION FOR HUMAN RIGHTS

WE THE UNDERSIGNED WANT TO BE PAID EVERY TWO WEEKS AND ON THAT DAY. IT IS UNFAIR TO HAVE US WAIT UP TO SIX DAYS AFTER THE PAY PERIOD [SIC] TO BE PAID. IT MAKES US LATE WITH OUR CREDITORS AND COSTS US MORE.

NOTE: NONE OF US CAN SUPPORT OURSELVES ON THIS SALARY.

[s] Heather Crumbaker
[s] Lisa Dokas
[s] Maureen Richey
[s] Vong Sautaug
[s] Kelli Cunningham
[s] Victoria Rawlinson
[s] Michelle James
[s] Gloria Streeter
[s] James Dotten

After all of the employees had signed the petition, Crumbaker ran off sufficient copies of the petition on Respondent's copy

machine so that all signers could have their own copy. Then Crumbaker took the original petition to Dierking's second floor office (Jt. Exh. 2) where she taped it to Dierking's computer terminal. This method of communicating with Dierking, who was not at work at the time and who kept irregular hours, had been used on many past occasions. That evening Dierking came to work and found the petition. As will be recite below in more detail, Dierking was not pleased and within a few days subsequent to December 2, both Crumbaker and Cunningham together with their supervisor, Jerry Smith, were all terminated. To put all this in perspective, additional background is required.

2. Respondent and its owner, Dierking

As noted above, Dierking is president and owner of Respondent, a small company which manufactures health and beauty aids

including oils which it then distributes to wholesale sellers, health food retailers, and small manufacturers. The business began in 1982 under a different name and with Dierking as co-owner. In 1984, the name of the business changed to its current name and later Dierking became sole owner. Apparently until August 1991, all went well with the business and approximately 25 employees were gainfully employed. Then, in August 1991, a devastating fire destroyed the business and for a period of time Respondent ceased operations until Dierking was able to acquire a new location.

Eventually, Respondent resumed operations but with its employee complement reduced to about 14 employees. Among those retained were Smith, Crumbaker, and Cunningham. In managing the business, Dierking read various articles from

management journals which he would occasionally copy and discuss with Smith, an admitted supervisor, and before his termination, the No. 2 person in the Company. Besides reading business and management publications, Dierking maintained a relationship with a former business associate named James Stotler, who testified for Respondent. According to Stotler, Dierking frequently discussed with him perceived problems with Smith serious enough, according to both Dierking and Stotler, that Dierking was about to fire Smith long before the petition was signed. However, Stotler allegedly talked Dierking out of firing Smith because the move would have placed too great a burden on Dierking. More about this below.

Dierking often worked very early in the morning or very late at night. When he was not at work, employees did not know

where he was, how to contact him, or when he might come in. Dierking allowed Crumbaker to have unrestricted use of his computer located in his private office except on those occasions when Dierking was working in his office.

Respondent's work environment is described as very informal with a variety of attire worn by employees. In the summer, for example, Dierking himself might come to work barefooted and wearing shorts. At noon, if Dierking was in the office that day, he and another employee might go out rollerblading for an extended lunch hour. In addition, employees were permitted flexibility as to work hours. While working, employees were permitted to discuss any personal subjects except for politics or religion, so long as the discussion did

not interfere with their work duties.[3] Employees were instructed to punch out on their computers two times a day for a break. Those employees who complied and not all did, were permitted to take their breaks whenever convenient for them so long as the phones were covered.

3. Heather Crumbaker

Hired on June 15, 1991 as a telemarketer, Crumbaker's career with Respondent has been erratic to say the least. Respondent presented evidence to show that Crumbaker often used extensive profanity in the workplace, often had arguments with fellow employees over perceived encroachments on their "turf", and offended two

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[3]Dierking testified that as owner and president of Respondent, he is not covered by any policy applicable to all other employees, including this policy. Accordingly, he frequently discussed politics with an employee named Wolf -- who had an opposing point of view. Wolf is no longer employed by respondent.

black female coworkers with insensitive and racist remarks.

Crumbaker's primary job was to deal with established customers and solicit new customers by phone. Frequently, however, she attempted to inject herself into the operation of the shipping department where she had no real authority. This created friction with employees who worked in the shipping department such as Gloria Streeter who frequently complained to Dierking about Crumbaker.

Another problem involving Crumbaker was a Workers Compensation claim she filed some months before the petition. In this claim, Crumbaker alleged that she was allergic to the fumes from some of the products manufactured and shipped by Respondent. As this claim was pending, Crumbaker was told by Dierking and Smith to stay away from the areas where the fumes

were the strongest. Frequently, Crumbaker disregarded this order, always, she testified, in order to achieve a laudable goal, such as expediting a customer's order.

Dierking's business associate Stotler, testified that sometime before the petition, he backed into Crumbaker's car in Respondent's parking lot. In the ensuing negotiations to repair the damages to Crumbaker's car, she was allegedly profane and disrespectful to Stotler's insurance agent. Stotler then discussed with Dierking, the experiences apparently related to him by the unnamed insurance agent. Dierking told Stotler that he had been thinking about terminating Crumbaker for some time because of dissatisfaction with her job performance and conflict with other employees. Whatever the level of Dierking's dissatisfaction, he did not

terminate her at that time.[4]

Not all the evidence regarding Crumbaker was negative. With the possible exception of Dierking, Crumbaker was the most skilled Respondent employee on the computer. Moreover, she treated customers well, did an acceptable volume of business, and earned a salary of $8.50 per hour (R. Exh. 22). Finally, while she annoyed other employees with her occasional eccentric behavior, they seemed to accept and tolerate her. Witness the ease by which she circulated the petition to the nonsupervisory employees working on December 2.

On March 25, Crumbaker gave notice of her intent to leave Liberty as of May 1, because she was not making the money she had been promised, because she had been experiencing headaches for which she

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[4]Some of Crumbaker's deficiencies were the subject of written disciplinary notices. (Jt. Exhs. 6(a)-(c).)

expected to file a Workers Compensation form, and because she refused to work harder to compensate for employees who do not have any responsibility (R. Exh. 18). Apparently by mutual agreement, Crumbaker withdrew her threatened resignation.

4. Kelli Cunningham

Cunningham worked for respondent between April and December 1991. Her job was telemarketing with primary responsibility for serving health food stores and chains. Although she was a college graduate, her pay rate was $8.50 per hour. In August or September a 50-cent-an-hour pay raise to $9 per hour had been promised to her, but was never implemented by Dierking. Dierking told Cunningham that he had forgotten that he promised it to her. When she made a fuss about not receiving the pay raise, Dierking rescinded it permanently. On August 21, Cunningham

wrote a long, handprinted letter to Dierking complaining about their relationship and the rescinded pay raise and offering to leave the Company as a possible solution to the friction between the two of them (G.C. Exh. 2). However, like Crumbaker's offered intent to leave the Company, Cunningham too withdrew her written intent to leave 1 or 2 days later, after Dierking apologized to her for the problems existing between the two of them.

5. Jerry Smith

Smith worked for Respondent between April 1990 to December 8, first with the title of vice president of sales, and in early 1992, Smith became vice president of Respondent. Smith's specific duties included accounts payable and accounts receivable, payroll, purchasing agent, and from time to time, liaison between Dierking and line employees.

After the fire, Smith worked out a mutually beneficial deal with Dierking, by which the former continued to work part time while he attempted to start a business of his own. Dierking liked the arrangement because he was able to pay Smith part-time wages while Dierking worked to build business volume. When Smith's own business venture did not succeed, he returned to Respondent's employment full time, at Dierking's request.[5]

Like Dierking's relationship with virtually all his employees -- not just those who testified for General Counsel -- his relationship with Smith was stormy. According to Dierking, Smith interfered with Dierking's ability to manage the Company. Moreover, Dierking added that

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[5]When Smith returned, he agreed to assume new responsibilities for company operations and to limit his research and development efforts which he had performed in the past.

Smith resisted Dierking's policies and was not productive. Respondent called witnesses to corroborate Dierking's claims. For example, Roger Richardson, a computer consultant who had performed work for Respondent, testified that in the fall, Dierking told him that Smith didn't respect Dierking anymore and wasn't doing a good job. Smith was, according to Richardson purporting to quote Dierking, hard to talk to. In November, Dierking even discussed with Richardson, the possibility of firing Smith and hiring someone else for less money.

Another witness named Don Hatter was also called by Respondent. Hatter started working for respondent in November 1991, and currently is director of operations. Hatter, whose job duties overlapped Smith's when they both worked for Respondent, testified that Smith resisted changes

relating to the computer system. In mid-November, according to Hatter, Dierking had decided to fire Smith, but Hatter advised against this move, arguing that without Smith, the workload would be too heavy on him and Dierking.

Dierking provided specific examples of how Smith allegedly failed to cooperate with him. For example, in October or November, Dierking wanted Smith to help move a heavy sink. When Smith agreed to the physical labor, but without enthusiasm, Dierking reprimanded him for a poor attitude and said Smith's job was on the line. In August, Smith hired an employee named Lisa Dokas on the recommendation of her mother who was a current Respondent employee. Smith knew when he hired Dokas, but did not tell Dierking, that Dokas was on judicial probation. Dierking subsequently discovered Dokas' background and

reprimanded Smith for not telling him. Still another dispute concerned Smith's failure to follow Dierking's instructions on the recycling of certain oils used in Respondent's business. Finally Dierking was particularly angered by Smith's curious practice of spraying antiseptic spray on Respondent's computers, fax machines, and door knobs to control colds and flu.

Despite Dierking's alleged continuing mistrust of and desire to fire Smith, I note some contradictions in Dierking's supposed relationship with Smith. For example, Dierking had several personal discussions with Smith about a custody dispute involving Dierking's children and the anguish this was causing Dierking. With respect to Crumbaker, Dierking told Smith to be careful in his dealings with Crumbaker and to be lenient in dealing with her, lest Crumbaker unfairly claim she was

being discriminated against (Tr. 838-839). Yet when Dierking decided to fire Crumbaker, he turned it over to Smith, the person who allegedly could not be counted on to follow Dierking's policies.

6. Other petition signers and petition aftermath

When Dierking found the petition on the evening of December 2, he first thought it was a joke (Tr. 23), but when he realized employees were serious, he became "confused and upset," because he hadn't abused anybody's human rights. "It was really bothersome to [him]." Dierking was "deeply hurt ... to think that [his] employees would communicate with [him] in this manner." (Tr. 44.) As an employer, Dierking felt an obligation to respond to [the petition], and to find out [what was behind it]. So the next day, Dierking began a series of one-on-one meetings in his office between himself and each

employee who signed the petition, except for Crumbaker who was off sick and Dotten who was not available. (Tr. 23-24). Each meeting lasted for 5 to 45 minutes. Hatter was present for most of the meetings. During the meetings, Dierking expressed his anguish at having been unfairly accused of matters, inquired as to who had prepared the petition and circulated it, and in the case of some employees, announced a pay raise prior to beginning the interviews. Another common theme conveyed by Dierking to employees at the meetings was Dierking's willingness to meet with employees at an open and official employee meeting where all could have their say, or at private one-on-one meetings between Dierking and a single employee.[6] However, in unmistakable

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[6]This was not the first time that Dierking had told employees about his preference for one-on-one meetings. Once before, Crumbaker and Cunningham had attempted to discuss with Dierking their request for a

terms, Dierking conveyed to employees that he didn't want any more petitions. After most employees called to Dierking's office expressed their regret to him for having signed the petition and claimed that they had been misled or even tricked into signing it by Crumbaker and Cunningham, Dierking indicated a willingness to overlook the transgression, again with the understanding that employees would not petition him again.

a. Rawlinson

General Counsel called Victoria Rawlinson who worked for Respondent between March 2 and February 25, as an essential oils clerk. This witness testified that she spent about 10-15 minutes learning about and discussing the petition and then voluntarily signed it. The following day,

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pay raise, but he would meet with only one at a time.

when Rawlinson came to work at about 8 a.m., she was talking to Dokas about the petition when Hatter came by and shouted at both women while pointing his right finger for emphasis, "That was very stupid of you to sign that petition! You should know better than that!" Rawlinson shouted back that signing the petition was her business, that she had a right to sign it, and that she didn't need Hatter to tell her what she could or couldn't do. Hatter advised her that she should have talked to Dierking first. The two continued their conversation outside where Hatter apologized to Rawlinson for upsetting her.

About 2 hours later, Rawlinson was called to Dierking's office where both Dierking and Hatter were present. Dierking began the conversation by telling her, "you have a 50-cent-an-hour pay raise." This was followed by Dierking showing her the

petition and asking her what she could tell him about it, including why she had signed it. When Rawlinson told Dierking that she felt justified in signing it, Dierking asked if she knew how bad the petition made him feel. Rawlinson then discussed an incident involving a promised pay raise which she had never received. She offered Dierking an ambiguous kind of apology, saying she was sorry that she didn't have the "guts" to come and complain to him by herself about matters covered by the petition. She also said she regretted signing the petition. Dierking made specific inquiry of Rawlinson about Crumbaker, who drew up and printed the petition, about Cunningham who used the calendar to demonstrate late payment of paychecks and about Smith. As to Smith, Rawlinson told Dierking that after she signed the petition, she met Smith in the

parking lot and offered to tell him what was going on upstairs. Smith, suspecting some type of employee concerted activity, told Rawlinson that he desired to remain completely ignorant of the situation.

Rawlinson concluded by telling Dierking that no one was coerced into signing the petition. A few days later, Dierking again inquired of Rawlinson as to whether anyone had coerced her into signing the petition and she conveyed the same answer as before.

Prior to the petition, Rawlinson intended to quit her job as [sic] Respondent due to stress in her personal life caused by her brother's illness and general dissatisfaction with payroll matters at Respondent. She discussed all this with Dierking and he offered to give her time off to attend to personal matters so she could continue on the job. In fact, when

she signed the petition, Rawlinson was working only 20 hours per week.

b. Streeter

Respondent called current employee Gloria Streeter as its witness. She began her employment in June 1990 as a salesperson and now does shipping including packaging and invoice preparation. When Crumbaker brought the petition to her on December 2, she readily signed it. The following day, Streeter was called to Dierking's office to meet with him and Hatter. Dierking asked her if she understood what she had done. When Streeter attempted to explain that she merely wanted to be paid on time, Dierking said he didn't appreciate her signing the petition because it was an attack on him. Eventually, Dierking made her understand that she really did not understand what she had done, and she so testified. In the future, Streeter

believed that employees should go to Dierking first before signing any petition.

Within a day or two of signing the petition, Streeter received a pay raise as did her close friend at work and fellow witness Michelle James. Both Streeter and James told Dierking during the postpetition meetings that Crumbaker had prepared the petition. In addition, when Dierking inquired of both, who were black women, whether Crumbaker had ever been discriminatory toward them, both responded affirmatively and also described Crumbaker's use of profanity in the workplace, Streeter testified that Dierking used the same language and once swore directly at her for losing some shipping books.

c. James

Respondent's witness, Michelle James, began working for Respondent on February 10, 1991, and currently does accounting

and some sales work for the Company. On December 3, she met with Dierking and Hatter after she had signed the petition the day before. Dierking asked James how she felt about the petition and James replied. Dierking responded that it was the way that it was brought to his attention that he really didn't like. James could have come to Dierking privately to discuss the matter, or she and other employees could have scheduled a meeting to discuss the issues, but signing a petition was the wrong way to go. (Tr. 587). Dierking indicated that he knew Crumbaker had been responsible for the petition, so he asked no questions about that subject. James apologized to Dierking for not reading through the petition before signing it.

On October 20, James had received a 50-cent-per-hour pay raise and on January 18, she received another 50-cent-per-

hour pay raise.

Like almost all other employees, James had planned to quit Respondent before she signed the petition, because of continuing friction with Crumbaker over how Crumbaker behaved towards her. Although James did not tell Dierking of her plans to leave, she did tell Smith and Streeter. Apparently the two pay raises mentioned above, other subsequent raises, and Crumbaker's termination all convinced James to change her plans.

d. Dotten

Respondent called current employee James Dotten as its witness. Disabled by morbid obesity, Dotten was hired in March to work in telephone sales. On December 2, Dotten was working about 12 ours per week. Crumbaker brought the petition to him and after she explained its purpose, he signed it.

Almost immediately after signing the petition, Dotten was stricken with signer's remorse. He attempted to consult with Smith about how to remove his name from the petition, but Smith said he didn't want to hear about it. Dotten did not meet with Dierking in the meetings held on December 3. But on Saturday, December 5, Dierking called Dotten at home to discuss the petition. Dotten indicated regret at having signed the petition and told Dierking of his attempt to have Smith help him remove his signature from the petition. Dierking said this was the first he knew of Smith's refusal to help Dotten.

e. Dokas (sic)

Still another current employee called by respondent was Lisa Dokas, who was hired in April. Currently accounts manager, Dokas and her mother, Maureen Richey, who did not testify, were preparing to leave

for the day, when presented with the petition which each signed.

The following day Dokas had two separate meetings with Dierking, the first in the morning. Dierking told her he was upset about the petition being circulated and signed on company time. Dierking was also upset Dokas didn't come to him first.

The second meeting in the afternoon was spent discussing Crumbaker with whom Dokas did not get along. Dokas told Dierking about rude statements allegedly made by Crumbaker to customers over the phone. On cross-examination, Dokas conceded she did not know for sure if Crumbaker was talking to a customer at the time she overheard certain statements.

About a month after signing the petition, Dokas who worked part-time between 8:30 a.m. and 1:30 p.m. received a pay raise.

7. Terminations

a. Crumbaker

After Crumbaker completed her shift on December 2, she told Smith that she was feeling sick and would not be reporting to work the following day. It is not clear whether Crumbaker also told Smith that notwithstanding her illness, she intended to come in during the afternoon to pick up her paycheck. Crumbaker had no phone in her apartment and her electricity had been shut off due to nonpayment of her bill. She needed her paycheck to pay the delinquent bill to restore power and to get some heat on in her apartment.

What Crumbaker did not know was that instead of receiving one check, she would receive two -- the second being her final check. Early on the morning of December 3, Dierking showed the petition to Smith and first asked if Smith was aware of it.

Smith answered that he had not been informed of its contents. Then Dierking stated that Crumbaker had been the ringleader or instigator of the petition drive and he intended to terminate her for that reason. He asked Smith what he thought of that, but Smith replied it was Dierking's decision to make. At another meeting with Smith on the same day, Dierking dictated to Smith the points which he desired Smith to include in Crumbaker's termination notice. Crumbaker's final termination notice reads as follows (Jt. Exh. 4):

> Ref. No. 19 Entered by JERRY SMITH
> Entry Type
> PROBLEMS
> Entry Date 12-03-93 Emp No 1016 first
> HEATHER Last CRUMBAKER
> Description INAPPROPRIATE BEHAVIOR
> Explanation
> PER JD
> HEATHER CRUMBAKER WAS TERMINATED ON
> 12-3-92 FOR THE FOLLOWING:
> 1. INAPPROPRIATE BEHAVIOR
>
> 2. PROBLEM WITH ATTITUDE TOWARD COMPANY OPERATION

3. INTERFERENCE WITH TEAM FUNCTIONING
P.S. ALL WAGES DUE THROUGH 12-2-92 WERE DELIVERED WITH TERMINATION NOTICE
Employee Notified YES
Employee Acknowledgment

Left out in the final draft above was the first point dictated by Dierking and contained in Smith's original notes (Jt. Exh. 5):

"Misconduct: instigated letter see enclosed."

Smith explained how Dierking's four points had been reduced to three. Smith originally prepared the memo in accord with his notes. Then he gave a copy to Dierking who left the building to return to his home, leaving Smith to terminate Crumbaker. Dierking then called two times to see if Smith had followed orders, but Crumbaker had not yet arrived. On the third call, Crumbaker was in the building but had not yet seen Smith. Dierking told Smith to make a last minute change to the termination letter deleting point 1 and renumber-

ing the remaining three points. Although Dierking denied doing this, I credit Smith in toto, finding him to be a credible witness and corroborated by the tell-tale space between new points 1 and 2, formerly points 2 and 3. In making the rush change, Smith did not have time to fully make the correction. In addition, Dierking never signed the second notice.

In any event, Crumbaker and Smith finally met and Smith followed Dierking's orders by terminating Crumbaker and giving her the notice and checks. Because Crumbaker did not expect that Dierking would react this way to the petition, she became distraught testifying that she needed her income to survive. Crumbaker told Smith she desired only to return to her home due to her illness.

After Crumbaker left the premises, Dierking called Smith from Dierking's home

to find out what happened. When Smith told him, Dierking responded, "I really appreciate you doing this for me, and I know things are going to be a lot better once we clean house." (Tr. 355).

During cross-examination of Dierking, the question arose as to why Dierking delegated the job of terminating Crumbaker to Smith. Dierking explained, first, he didn't trust Crumbaker's emotions; second, Smith had handled other situations of a similar nature for Dierking; third, Dierking believed Smith had a relationship with Crumbaker; and finally, Dierking believed there would be too much stress involved. What all this boiled down to in the words of Dierking himself, is that he "was being a little bit of a wimp in just not wanting to deal with the situation." (Tr. 10).

b. Cunningham

On December 3, Cunningham met with

Dierking in the latter's office. Hatter was not present. Dierking told her he was very upset about the petition and he asked her why she had signed it. She answered that she signed it because she agreed with the purpose of the petition. Dierking then asked why Cunningham didn't come to him individually, but she said she was merely following his suggestion to put complaints in writing. Since all employees were in agreement, she explained, they decided to consolidate their complaints into a single petition. Dierking solicited an apology, but Cunningham refused. Then Dierking threatened that he could fire her and all others who had signed the petition.

After Cunningham learned that Crumbaker had been fired, she asked Smith on December 3 whether she too would be fired. Smith answered that no decision had yet been made. On Friday, December 4, Cunning-

ham had the day off. However, Dierking told Smith that he would probably be firing Cunningham because Dierking was upset and disappointed that Cunningham did not apologize nor back away from the petition. To make matters worse, Dierking continued, Cunningham was defiant and obstinate. Smith advised caution and suggested Dierking consider this decision over the weekend which Dierking agreed to do.

On the following Monday, the area was hit by a severe snowstorm. As a result, Cunningham arrived late about 11:30 a.m. and Smith didn't come in at all. Upon her arrival, Dierking met her, tendered her termination notice and final check, and told her he was letting her go. The notice reads as follows (Jt. Exh. 7):

MEMORANDUM OF TERMINATION

EMPLOYEE: Kelli Cunningham
DATE: 12-04-92

EFFECTIVE DATE OF TERMINATION:

12-07-92

PRESENT AT TERMINATION: JAMES R. DIERKING, PRESIDENT

LOCATION: 8120 SE STARK ST., PORTLAND OR 97215

REASONS FOR TERMINATION:

1. Employee went out and made her problems those of the entire company creating disruption in the work environment. Failed to address her problems or concerns in a professional & constructive manner with management. Management had an open door policy to deal with employee complaints or problems.
2. Promoted the Petition for Human Rights on company time. Continues to maintain an attitude that such activity is appropriate behavior, which places management in an unacceptable position and continues disruption in the workplace.

SIGNED: JAMES R. DIERKING - PRESIDENT
DATE:

Before she left the premises, Cunningham went to Dierking's office "to get some things of (sic) her chest." There she denied the validity of the reasons given for her termination and noted that she had no past written warnings for her

behavior.[7] Like most employees, she had argued with Dierking over wages thought to be too low, and other matters unique to Cunningham such as a spoiled food odor emanating from her office and a disagreement over Cunningham's office lighting.[8]

c. Smith

On the Monday Smith was absent due to a snowstorm, Rawlinson had a conversation with Hatter. He told Rawlinson that "Smith's on the hot seat, many things are not going right, and there's going to be some big changes around here." Rawlinson promptly relayed Hatter's remarks to Smith

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[7]The record contains one past disciplinary notice for Cunningham dated June 4. (Jt. Exh. 8.)

[8]During 1992, Cunningham had serious personal problems involving the deaths of more than one member of her family. Dierking promised to cooperate with her need for extra time off from work because of the deaths.

at his home, admonishing him over the telephone "to be careful, because I don't think you are going to have a job in the morning."

The following morning Dierking called Smith into his office immediately after Smith arrived and told Smith he was being let go. Smith responded that his termination was insignificant because the Company was insignificant. Dierking then gave Smith his final check and his termination notice which reads as follows (Jt. Exh. 9):

MEMORANDUM OF TERMINATION

EMPLOYEE: JERRY SMITH
DATE: 12-08-92
EFFECTIVE DATE OF TERMINATION: 12-08-92

PRESENT AT TERMINATION: JAMES R. DIERKING, PRESIDENT

LOCATION: 8120 SE STARK ST., PORTLAND OR 97215

REASONS FOR TERMINATION:

1. Failure to timely notify management of inappropriate employee activity on company time and on company premises.

> History of failing to communicate important information regarding employees.
> 2. Misrepresenting awareness of inappropriate employee activities.
> 3. Inability to perform to managements expectations & needs.
>
> SIGNED: JAMES R. DIERKING - PRESIDENT
> DATE

B. Analysis and conclusions

At page 55 of the transcript, while Dierking was undergoing examination by the General Counsel as an adverse witness he made the following statement:

> I'm looking - I've asked the NLRB - I really want to know [what] the law is. I've asked for months, and I don't get a straight answer except its subject to the circumstances. So I would like someone in writing to tell me what my company can or cannot do. I don't know, to be honest with you.

Although on his record, Dierking's sincerity can be doubted, I will assume strictly for the sake of argument that Dierking is as confused as he claims and I will proceed to tell him what the Act prohibits and allows. Of course, Dierking'

alleged lack of knowledge is no defense. American Freightways Co., 124 NLRB 146, 147 (1959).

1. Termination of Crumbaker and Cunningham

To begin, I find that preparation, circulation, and signing of the petition in issue in this case is concerted protected activities. See Meyers Industries (Meyers I), 268 NLRB 493 (1984), remanded sub nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986), affd. sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1987). See also Alumina Ceramics 257 NLRB 784 (1981). In the instant case, employees who signed the petition attempted to bring two matters to the employer's attention, the delayed payment of paychecks and the perceived low salaries. In C.D.S. Lines, 313 NLRB No. 40 (Nov. 23, 1993), the Board

affirmed a decision of the administrative law judge finding that certain discharges violated Section 8(a)(1) of the Act. At page 6 of the judge's decision, the administrative law judge wrote:

> In order to establish a violation of Section 8(a)(1) of the Act on the part of the Respondent in discharging the Bungards, it is necessary to establish that they had engaged in activity which was both concerted and protected and that such activity was the cause, in whole or in part, of the discharges." "[I]t is obvious that higher wages are a frequent objective of organizational activity, and discussions about wages are necessary to further that goal." Jeanette Corp. v. NLRB, 532 F.2d 916, 918 (3d Cir. 1976). "[D]issatisfaction due to low wages is the grist on which concerted activity feeds." Supra at 319.

See NLRB v. Henry Colder Co., 907 F.2d 765 (7th Cir. 1990), where court found employee discharge to be unlawful where based on bringing group complaint about the timing of employee training session to management's attention. See also NLRB v. Evans Packing Co., 463 F.2d 193 (6th Cir. 1972);

Salisbury Hotel, 283 NLRB 685, 686-687 (1987).

The petition activity in question here consumed between 15 to 30 minutes of work time for most involved employees. Employees who are unrepresented and working without an established grievance procedure have a right to engage in spontaneous concerted protests concerning their working conditions. Cf. Waco Inc., 273 NLRB 746 (1984). These employees may not be legitimately disciplined for engaging in protected activities, so long as they are not unduly disruptive of the employer's operations. I find no undue disruption occurred here. See Johnni Johnson Tire Co., 271 NLRB 293, 294-295 (1984); compare Cambro Mfg. Co., 312 NLRB 634 (1993).

In Mast Advertising & Publishing Co., 304 NLRB 819 (1991), the Board relied on NLRB v. Thor Power Tool Co., 351 F.2d 584,

587 (7th Cir. 1965) enfg. 148 NLRB 1379, to recite the balancing test for cases like that at bar: An employee's right to engage in concerted activity may permit some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect. See Joseph De Rario DMD, P.A., 283 NLRB 592, 593 (1987). By this standard, Respondent violated the Act in firing Crumbaker and Cunningham.

Once Dierking learned of the petition, he reacted with unmistakable purpose: to coerce petition signers into repudiating their protected activities, and to discover the primary organizers of the activity. In these pursuits he succeeded. First, he learned that Crumbaker had prepared the petition and circulated it to others for signatures. Crumbaker's personal and professional deficiencies tolerated on the job until then were suddenly found to be intol-

erable. Then Dierking engaged in a coverup of his real reason for firing Crumbaker by telling Smith to make an 11th hour change on the termination notice.

During the hearing, Dierking claimed that Crumbaker was a statutory supervisor on or about December 2.

A supervisor is defined in Section 2(11) of the Act as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievance, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

The law on the subject is well summarized by Judge Itkin in the case of Amperage Electric, 301 NLRB 5, 13 (1991):

> Actual existence of true supervisory power is to be distinguished from abstract, theoretical, or rule book authority. It is well established that a rank-and-file employee cannot

be transformed into a supervisor merely by investing him or her with a "title and theoretical power to perform one or more of the enumerated functions." NLRB v. Southern Bleachery & Print Works, 257 F.2d 235, 239 (4th Cir. 1958), cert denied 359 U.S. 911 (1959). What is relevant is the actual authority possessed and not the conclusory assertions of witnesses. And while the enumerated powers listed in Section 2(11) of the Act are to be read in the disjunctive, Section 2(11) also "states the requirements of independence of judgment in the conjunctive with what goes before." Poultry Enterprises v. NLRB, 216 F.2d 798, 802 (5th Cir. 1954). Thus, the individual must consistently display true independent judgment in performing one or more of the enumerated functions in Section 2(11) of the Act. The performance of some supervisory tasks in a merely "routine," "clerical," "perfunctory" or "sporadic" manner does not elevate a rank-and-file employee into the supervisory ranks. NLRB v. Security Guard Service, 384 F.2d 143, 146-149 (5th Cir. 1967). Nor will the existence of independent judgment alone suffice; for "the decisive question is whether [the individual involved] has been found to possess authority to use [his or her] independent judgment with respect to the exercise [by him or her] of some one or more of the specific authorities listed in Section 2(11) of the Act." See, NLRB v. Brown & Sharpe Mfg. Co., 169 F.2d 331, 334 (1st Cir. 1948). In short, "some kinship to management, some empathetic relationship between

[supervisor] and employee, must exist before the latter becomes a supervisor of the former." NLRB v. Security Guard Service, supra.

As the Board and the Seventh Circuit have noted, the Board owes a duty to employees not to construe supervisory status too broadly, for if the individual is deemed a supervisor, he loses the Section 7 rights Congress intended to be protected by the Act. Phelps Community Medical Center, 295 NLRB 486, 492 (1989); Westinghouse Electric v. NLRB, 424 F.2d 1151, 1158 (7th Cir. 1970). For that reason, the party contending that a person is a supervisor carries the burden of persuasion on that issue. Adco Electric, 307 NLRB 1113 (1992); Biewer Wisconsin Sawmill, 312 NLRB 506 (1993).

In the present case, I find no credible evidence whatsoever that Crumbaker was ever a statutory supervisor. Clearly, she was never told by Dierking or anyone else

that she was a supervisor. The failure to inform Crumbaker that she was a supervisor indicates she was a rank-and-file employee. NLRB v. Adco Electric, 6 F.3d 1110, 1118 fn. 5 (1993). More importantly, I find no evidence of any specific employees that Crumbaker supervised. When she encroached on the job responsibilities of others, such as Streeter, the affected employee either ignored Crumbaker and/or complained to Dierking about her. She had no authority to hire or fire employees, nor developed any company policies beyond what any of the employee could do. I find that Respondent failed to meet its burden of proving that Crumbaker was a supervisor.

I also reject any claim that Crumbaker was fired for using profanity in the work-place, something that most other employees did including Dierking himself.

As to Cunningham, she was not so much

the organizer as she was an employee who refused to be bullied into disavowing her signature on the petition. As to both Crumbaker and Cunningham, I reject any claim that they were fired for not punching out on the computer during the petition activity. No one who signed the petition did, but only these two were fired. Other petition signers received pay raises. See American Thread Co. v. NLRB, 631 F.2d 316, 332 (4th Cir. 1980), where evidence of glaring disparity in treatment of employees is found to be evidence of unlawful motive. Such disparate treatment is evidence of discrimination. NLRB v. Adco Electric, supra at 1119.

Similarly, the record shows that Dierking - when he was present - did not prohibit use of the copying machine for occasional private purposes, such as charitable activities. Thus reliance on

unauthorized use of the copy machine to justify Crumbaker's discharge, is a variance from past practice and is evidence of illicit motive. Birch Run Welding & Fabrication v. NLRB, 761 F.2d 1175, 1181 (6th Cir. 1985).

Other factors compel my conclusion that both Crumbaker and Cunningham were fired in violation of Section 8(a)(1). For example, the timing and abruptness of the terminations coinciding with the petition activity cannot be ignored. NLRB v. U.S. Industry, 701 F.2d 452, 467, 468 (5th Cir. 1983); NLRB v. Long Island Airport Limousine Service Corp., 468 F.2d 292, 295 (2d Cir. 1972).

I also find that Respondent attempted to shore up its shaky rounds for discharge by attempting to present evidence showing that Crumbaker and Cunningham were not good employers (employees - sic). This

unsuccessful strategy contributes to findings of pretext. See Weather Shield of Connecticut, 300 NLRB 93, 96 (1990). Shifting reasons for an employee's termination is evidence of pretext. When pretextual reasons for a discharge are given, this means that the employer wishes to hide the real reasons, which in this case, was because both Crumbaker and Cunningham engaged in concerted protected activity. See Sherwin-Williams Co., 313 NLRB No. 16 (Nov. 23, 1993).

In sum, for the reasons stated above, I find that the terminations of Crumbaker and Cunningham violated Section 8(a)(1) of the Act.[9]

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[9]As an alternative finding under Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). I find that General Counsel has established a prima facie case that Crumbaker and Cunningham were fired for engaging in protected concerted activity. For the

2. Termination of Smith

All agree that for all times material to this case, Smith was a statutory supervisor. The law regarding discipline and discharge of supervisors is succinctly stated by Professor Hardin in I The Developing Labor Law 132 (3d ed. 1992):

> Supervisors are excluded from the act's definition of "employee" because they are agents of the employer. Accordingly, supervisors do not enjoy the protection of the act and are subject to other discipline for engaging in union or concerted activity. Thus, when an employer has disciplined or discharged a supervisor out of a legitimate desire to assure the loyalty of its management personnel and its action was "reasonably adapted" to that end, the Board has found such conduct permissible even if an incidental effect was to instill in employees the fear that the same fate would befall them for engaging in protected activity.
>
> For many years, however, the Board has held that the discipline or

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reasons stated in the text of the decision, I find that Respondent has failed to show that the employees would have been fired even if they had not engaged in protected concerted activities.

> discharge of a supervisor violates section 8(a)(1) "when it interferes with the ... exercise [by employees of] their rights under section 7 of the Act. Thus, an employer may not discipline or discharge a supervisor ... for refusing to commit unfair labor practices. (Citations omitted.)

Applying the law to the facts of this case, I find that Respondent violated Section 8(a)(1) of the Act by discharging Smith. I further find, contrary to Respondent, that the reason Smith was discharged was due to Smith's refusal to commit an unfair labor practice. See Phoenix Newspapers, 294 NLRB 47, 47-48 (1989); Russell Stover Candies v. NLRB, 551 F.2d 204, 206-207 (5th Cir. 1975).

Smith was offered three opportunities to inform himself about the petition prior to its delivery to Dierking. First, Crumbaker was making copies of the petition when Smith happened by. She offered to let Smith see it, but Smith said just give it to him (Dierking). Later, as noted above,

Rawlinson and Dotten each separately and for their own reasons, desired to discuss the petition with Smith, but he declined again. During Dierking's interrogations of employees, it didn't take long for Dierking to learn that Smith could have nipped this protected activity in the bud, but he declined to do so. (Tr. 34-35).[10] Dierking asked Smith a day or so after finding the petition, "Jerry, do you know anything about this?" (Tr. 30). Smith had intentionally kept himself ignorant of the petition, but he knew at least that there was some sort of employee complaint being directed to Dierking's attention and he didn't want to get involved (Tr. 343).

It is clear to me that Dierking wanted Smith to stop the petition activity before

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[10]Under Board law, I need not concern myself with Smith's motives for his "see no evil, hear no evil, speak no evil" strategy.

it came to Dierking's attention. Moreover, Dierking's stated reasons for discharging Smith, that Smith misled Dierking (Tr. 35), that Smith was disloyal (Tr. 35), that Smith interfered with Dierking's ability to manage Respondent (Tr. 842-843), and similar reasons were not true. See Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 479 (9th Cir. 1966). Instead Smith was fired for failing to commit an unfair labor practice by stopping the employee petition activity as soon as he discovered it. Parker-Robb Chevrolet, 262 NLRB 402, 404 (1982). See also Elder-Beerman Stores Corp., 173 NLRB 566 (1968), enfd. 415 F.2d 1375 (6th Cir. 1969), cet. denied 397 U.S. 1009 (1970).

3. Threats and interrogations

At page 18 of her brief, General Counsel asserts that Hatter coerced Rawlinson the day after the petition when

he said it was stupid of the employees to have signed the petition. It is unnecessary to determine whether Hatter's remarks violated the Act because I find that General Counsel has failed to prove that Hatter was a statutory supervisor when he confronted Rawlinson. Hater testified that as of December 3, he was training to be operations manager for respondent. Exactly what Hatter did as a trainee does not appear of record.

It is true, as General Counsel points out, that Rawlinson considered Hatter to be her supervisor and that she leaned on him for knowledge of the area of essential oils, where he was more knowledgeable than she was. (Tr. 321-323.) Because Hatter was thought to be a supervisor, he was not asked to sign the petition. Whether employees considered Hatter to be a supervisor is not determinative however,

because a finding of supervisory status must be based on "primary indicia," i.e., those functions actually listed in Section 2(11) of the Act. PHT, Inc., 297 NLRB 228, 231 (1989), accompanied by the use of independent judgment in the execution or recommendation of any of the Section 2(11) functions. John N. Hansen Co., 293 NLRB 63 (1989). Evidence of independent judgment is lacking here.

In looking through the record, I note that unlike Smith who was paid a salary, Hatter was paid on an hourly basis. Hatter was supposed to report to Smith, but instead reported directly to Dierking, a fact I find to be without significance in proving supervisory status. Finally, I note that Hatter sat in with Dierking as the latter interviewed employees about the petition. This occurred after the exchange with Rawlinson and again is insufficient to

show supervisory status. For the reasons stated above, I will recommend that this segment of the case be dismissed.

By contrast to Hatter, the actions of Dierking in calling employees to his office for one-on-one conversations about the petition leave little room for doubt. Applicable Board law is summarized in Kellwood Co., 299 NLRB 1026 (1990):

> The Board in Rosemore House,[6] held an interrogation of an open and active union supporter violates Section 8(a)(1) when, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with employee's rights guaranteed by the Act. The Board also outlined factors that may be considered in applying this test: the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. Subsequently, in Sunnyvale Medical Clinic, 277 NLRB 1217 (1985), the Board held that the analysis set forth in Rosemore House applid to all interrogations, not only those involving open and active union supporters, and that whether the employee involved was an open and active union supporter was a relevant factor to be considered in evaluating the total context of the interrogation.

[6]269 NLRB 1176 (1984), enfd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB, 760 F.2d 1006 (9th Cir. 1985).

There was no union involved here and the petition signers could be described as open and active supporters of the protected activity. However, Dierking's statement of how hurt and disappointed he was coupled with his repeated questions about the identity of persons responsible for the petition clearly coerced employees in the exercise of the Section 7 rights. Employers (employees - sic) reacted accordingly by either responding to Dierking in a vague expression of regret or flat-out retracting their support of the petition. As stated by the court in NLRB v. Ilinois-American Water Co., 933 F.2d 1368, 1374 (7th Cir. 1990):

> The economic dependency of the employee on the employer makes the employee extremely sensitive to employer statements, therefore we

> "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

In sum, I find that Dierking violated Section 8(a)(1) of the Act when he interrogated employees about their motivations for signing the petition, the identify of those most responsible for the petition, and related questions including statements not to petition Respondent in the future for the redress of grievances. Under the circumstances present in this case, the interviews were threatening, coercive, and intimidating.

CONCLUSIONS OF LAW

1. Respondent Liberty Natural Products, Inc. is an employer engaged in commerce within the meaning of Section 2(2), 6), and (7) of the Act.

2. By discharging Heather Crumbaker and Kelli Cunningham for their concerted protected activities Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By discharging statutory Supervisor Jerry Smith for refusing to commit unfair labor practices, Respondent has violated Section 8(a)(1) of the Act.

4. By interrogating its employees about their concerted protected activities, and about the identity of persons responsible for a petition to the employer to redress certain grievances and by threatening and coercing employees to preclude future concerted protected activities, Respondent has violated Section 8(a)(1) of the act.

5. Other than found above, Respondent has committed no other unfair labor practices.

6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discharged Heather Crumbaker, Kelli Cunningham, and Jerry Smith in violation of the Act, I find it is necessary to order Respondent to offer them full reinstatement to their former position or, if such positions no loner exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings that they may have

suffered from the time of their discharge to the date of Respondent's offer of reinstatement. Backpay shall be computed in accordance with the formula approved in F.W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987).[11]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Liberty Natural Products, Inc., Portland, Oregon, its officers, agents, successors, and assigns,

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[11]Under New Horizons, interest is computed at the "short term federal rate" for the underpayment of taxes as set out in the 1986 amendment for 26 U.S.C. § 6621.

[12]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

shall

1. Cease and desist from

(a) Discharging employees for activities protected by Section 7 of the Act.

(b) Discharging a statutory supervisor for refusing to commit unfair labor practices.

(c) Interrogating employees concerning their protected concerted activities and threatening then (sic) if they seek to engage in concerted protected activities in the future.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[13]

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[13]General Counsel has not sought a broad order under Hickmott Foods, 242 NLRB 1357 (1979). Thefore (sic), I need not decide whether Respondent's unfair labor practices are so egregarious or widespread as to be deserving of such an order. See C.D.S. Lines, 313 NLRB No. 40 at fn. 2,

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Heather Crumbaker, Kelli Cunningham, and Jerry Smith full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings, with interest, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any references to the unlawful discharges of Heather Crumbaker, Kelli Cunningham, and Jerry Smith and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make

---

supra.

available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Portland, Oregon, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places

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[14]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations of the complaint as to which no violations have been found are hereby dismissed.

Dated, February 25, 1994

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After hearing in which all parties were afforded the opportunity to present evidence it has been found that we violated the National Labor Relations act in certain

respects and we have been ordered to post this notice.

WE WILL NOT interrogate or discharge employees for concerted activities protected by Section 7 of the Act.

WE WILL NOT discharge our supervisors for refusing to commit unfair labor practices.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL offer Heather Crumbaker, Kelli Cunningham and Jerry Smith, full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings plus interest.

APPENDIX D

Portions of Transcript
of N.L.R.B. Proceedings

Page 69, testimony of Heather Crumbaker:

*****

A. Well, it was the fall of the year, and we don't get paid for holidays and that type of thing. Many of us had been asking for an increase in our pay rate and hadn't received it, and so with the impending holidays, and occasionally the company would just shut down if the volume didn't maintain. We were facing a period of uncertain finances. We knew that based on the rules of pay that we wouldn't be paid for our last check in December until January 6th, which for bills due on the first it's kind of a hard thing. So there was just -- and we were just kind of a little anxious.

Page 209-210:

****

JUDGE STEVENSON: I'm sorry. I thought

you had finished.

The Board has stated that decisions of state tribunals such as unemployment or workmen's compensation or similar type tribunals are admissible in Board hearings. They do not determine the Board decision. We are not bound by the decision, but it may be a factor. It may be helpful to one degree of another in reaching a decision in this case. So on that basis and the prior precedent which I am aware of, I will admit into evidence Respondent's Exhibit 7.

[Respondent's Exhibit Number 7 for identification was received into evidence.]

****

Respondent's Exhibit 7:

EMPLOYMENT DIVISION
Hearings Section
875 Union Street NE
Salem, OR 97311

DP# 10830

Decision Mailed: 03-21-93
Decision Final: 05-11-93
Case No. 93-P-2999

SSA No.: 038-30-3064
UI (48-93)

CLAIMANT	EMPLOYER
HEATHER L. CRUMBAKER	LIBERTY NATURAL PRODUCTS
PO BOX 4554	8120 SE STARK STREET
VANCOUVER WA 98662	PORTLAND OR 97215

REFEREE DECISION

The claimant is denied benefits.

History of the Case: An administrative decision was mailed to the parties on March 19, 1993, allowing claimant benefits under ORS 657.176. A hearing was requested on March 23, 1993. A hearing was held by telephone on April 20, 1993. The claimant did not participate in the hearing. The employer was represented by Jim Dierking, president. Two witnesses testified for the employer.

Legal Issue: Was claimant discharged for misconduct connected with work? (See ORS 657.176(2)(a) and OAR 471-30-038.)

Referee's Finding of Fact:

*****

(7) In early 1992, the claimant complained to the president that the smoke residue on equipment and materials in the manufacturing portion of the plant bothered her. She told the employer that she believed that the smoke residue was causing health problems for her. (8) She also complained about smoke residue in the vice president's office. (9) The president told the claimant to stay away from those areas and use the company telephone and computer mail system to communicate with people in the areas she avoided.

(10) In late March 1992, the claimant submitted a letter of resignation effective on May 1, 1992. (11) She cited headaches, lower than expected earnings and problems with co-workers, as the reasons for her decision. (12) The claimant did not leave on that date and was allowed to continue working. (13) By early May 1992, the

president began receiving reports from the vice president and co-workers regarding the claimant's behavior. (14) Co-workers and managers reported that the claimant was ill tempered, demanding and generally unpleasant while working. (15) The president learned that she was not getting along with the head of the shipping department or the vice-president. (16) He again reminded the claimant to stay away from the vice president's office and the manufacturing area. The shipping department was located in the manufacturing area. (17) The president hoped thus defuse the situation without confronting the claimant directly. (18) Problems continued and the claimant ignored the president's instructions and often entered areas which she was told to avoid.

(19) On May 19, 1992, the claimant filed a Worker's Compensation claim alleging an on-the-job injury occurred when she was in

the shipping area. (20) The president told her that she would not have been exposed to the oil which she claimed had harmed her had she avoided the shipping department. (21) The president again gave her a clear warning that she was to avoid certain areas of the plant. (22) In August 1992, co-workers reported that the claimant was heard swearing at customers over the telephone and at other employees. (23) One co-worker reported that she was using racial slurs directed towards an employee in the shipping department. (24) The president again met with the claimant and told her to stay out of the shipping department and to refrain from the use of inappropriate language in the work place. She was told that her job was in jeopardy.

(25) On December 1, 1992, the president learned about a petition signed by a number of employees which requested changes in

paydays. (26) Because of the way the petition was written, the president began questioning employees about their grievances. (27) Employees consistently complained about the claimant, citing her as a disruptive influence, her rudeness to customers and co-workers and her continued presence in the manufacturing and shipping areas. (28) Several employees quoted the claimant as acknowledging her violation of the president's directive to stay out of the shipping area during one of her regular stops there.

*****

Conclusion and Reasons: The claimant was discharged for misconduct connected with the work.

*****

OAR 471-30-038(3) defines misconduct in part as a "willful or wantonly negligent violation of the standards of behavior

which an employer has the right to expect of an employee," or as "[a]n act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest."

"Wantonly negligent" is defined in OAR 471-30-038(1)(b) as "indifference to the consequences of an act or series of actions or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards which an employer has the right to expect of an employee."

*****

DECISION

The administrative decision mailed on March 19, 1993 is set aside. The claimant is subject to disqualification from bene-

fits under ORS 657.176(2)(a) until requalified under Employment Division Law.

MURRAY MAC NEILL
Referee

****

Page 260, testimony of Victoria Rawlinson:

A. Right, but I was told before by Michelle James, that came down and said, congratulations, Jim has given you a raise. And I never heard anything after that, never, and when that petition came up, I was -- felt justified to question that. I did see Jim Dierking with Michelle, because she did get a raise that day and said -- I said, how do you know that I have a raise, and she said, because Jim told me you were getting one.

Q. And this was the day of the petition?

A. No, that was before. That was a few days before. That is why I signed the petition, one of the reasons why I felt

justified.

Q. And you told Mr. Dierking that?

A. That's correct.

*****

Page 296, testimony of Victoria Rawlinson:

Q. Thank you.

Did Mr. Dierking communicate to you that you had no concern; that there was absolutely no ramifications for having signed the petition, yes or no?

A. I'd have to say -- repeat the question. I'm sorry.

Q. Did Mr. Dierking communicate to you that there would be -- you did not have to worry about being fired because of the petition?

A. That's correct.

Q. Did he accept your apology?

A. Yes.

Q. Did he indicate to you that he would be willing to take a look at the issues in

the petition?

A. Yes.

Q. Did he indicate to you that he had a hard time understanding what the petition was really about?

A. Yes.

*****

Page 306, testimony of Victoria Rawlinson:

BY MR. DIERKING:

Q. At the time of the initial meeting, did Mr. Dierking again tell you that he would address the petition issues and that he respected your right to bring up issues?

A. Yes. In that wording ,yes.

Q. Did Mr. Dierking indicate he was going to fire anyone for having signed the petition and having brought up those issues?

JUDGE STEVENSON: Now, you --

MS. SCHELDRUP: Your Honor, I think it's been asked and answered.

JUDGE STEVENSON: Sustained. Asked and answered.

MR. DIERKING: Okay.

*****

Page 418, testimony of Jerry Smith:

Q. This is the employment Division transcripts, Respondent's Exhibit Number 1. I'd like you to take a look at these and identify them as the transcripts from the hearing.

A. It appears to be them.

MR. DIERKING: Your Honor, I'd like to introduce this into evidence.

JUDGE STEVENSON: Any objection to Respondent's 1?

(Pause).

MS. SCHELDRUP: I hesitate to have it in the record, because it's testimony that was not subject to any kind of cross-examination and so forth, but it does relate to the discharge of Mr. Smith.

JUDGE STEVENSON: Do you content, Mr. Dierking, that there's some impeaching matter that is some testimony in that transcript that's different than what was said here in this hearing?

MR. DIERKING: Yes, Your Honor.

JUDGE STEVENSON: All right. I'll admit Respondent's Exhibit Number 1 into evidence.

Respondent's Exhibit Number 1:

STATE OF OREGON
EMPLOYMENT DIVISION
Department of Human Resources
875 Union Street N.E.
Salem, Oregon 97311

IN THE MATTER OF THE REVIEW OF REFEREE DECISION	
JERRY J. SMITH	
SSA NO. 562-96-3152	TRANSCRIPT OF TESTIMONY
CLAIMANT	CASE NO. 93-S-210
LIBERTY NATURAL PRODUCTS, INC.	
EMPLOYER.	

Hearing held in the State Employment Office, 875 Union Street Northeast, Salem, Oregon, beginning at 2:40 p.m.,

Tuesday, January 26, 1993

BEFORE: O.N. FAIRCLOTH, Referee
TRANSCRIBER: MARY KAY DAVIS

PRESENT:

DIVISION: NOT REPRESENTED

CLAIMANT: JERRY J. SMITH, via telephone

EMPLOYER: JAMES R. DIERKING, appearing via telephone

INDEX

DIVISION'S WITNESSES: PAGE:

NONE

CLAIMANT'S WITNESSES:

JERRY R. SMITH
Direct Examination 28
Cross-Examination (recalled) 43

EMPLOYER'S WITNESSES:

JAMES R. DIERKING
Direct Examination 7
Cross-Examination (Recalled) 41

*****

Page 39, resp. Exh. 1, testimony of Jerry Smith:

... this was some dissatisfaction on - of the general performance of the company and

the performance of the three individuals had - with the context that allowed some incident to be seized upon to terminate us. Specifically, I think, as I stated in my discharge questionnaire from the Employment Division, the three most highly paid employees were terminated. We were the highest-paid employees there, other than Mr. Dierking. And we also were the senior sales staff. So I believe that this was really an - an attempt to re - in - in our slowest month, the slowest - just about the slowest month of the year, to reorganize the marketing department into what was perceived as a less expensive modality, emphasizing mail promotion and so forth, which Mr. Dierking had discussed, that he was wanting to move in that direction. So although I think that he - Mr. Dierking does conceive that I may have done some wrong to him, I think that this situation

was very convenient to pursue his general intent to pare down the expense of our labor and so forth.

*****

Page 441, testimony of Jerry Smith:

Q. Do you believe Mr. Dierking discharged you for issues relating to economics?

A. Yes.

*****

Page 448, testimony of Jerry Smith:

Q. Thank you.

Did Mr. Dierking tell you that he was going to terminate the employees who signed the petition?

A. No, not --

*****

Page 587-88, testimony of Michelle James:

A. We talked about the petition. You asked me how I felt about it. I told you how I felt about it, and you said you

didn't mind about bringing this to your attention, but it's the way that it was brought to you that you didn't really like.

Q. Was there any indication on whether or not the issues would be addressed?

A. Yes.

Q. Was any mention made of labor rights?

A. Yes.

Q. Can you tell us about that, please?

A. I don't really, exactly remember. I just remember part of it is you saying you don't mind if somebody wants to say this; they have their right to do this. You told me if I wanted to do this, I had the right to do this if I wanted to, but if I felt this way, you wish I would have come to you personally, you know, or talked to you, or all of us could have come to you and talked to you. We could have set up a meeting instead of, you know, signing a petition

and going about it that way.

Q. Were you told by Mr. Dierking that you can't do that?

A. No.

Q. Was there any mention of anyone being fired for having participated in the petition activities?

A. No.

Q. Was any -- Did Mr. Dierking bring up the issue of participating in such activities on company time?

A. Did you bring it up?

Q. Did Mr. Dierking?

A. Yes.

*****

Page 663, Testimony of Michelle James:

Q. Did you indicate that if he did that, you might quit?

A. Yes.

Q. Did Mr. Dierking indicate to you that he would call the EEOC and ask for

their assistance?

A. Yes.

Q. Did they refuse?

A. Yes.

*****

Page 697, testimony of Lisa Dokos:

Q. Did Mr. Dierking make any other statements to you?

A. No, he didn't, not that I can recall. he called me in later and said that -- well, I can't really remember what he said, but he just was -- he wasn't upset, and he just said that -- I remember specifically saying that he was upset because we did it on company time and that he was upset that we didn't come to him first and that it was a surprise to him in the way we went about it.

*****

Page 738, testimony of Don Hatter:

Q. Can you tell the Judge?

A. In context, I personally heard the phrase "dumb niggers." I'm sorry. I just -- that's worse than swearing to me.

Q. Was this in a -- were you in a direct conversation with Dr. Crumbaker?

A. No, at that time I was not.

Q. In what context -- it's important to tell the Judge just the context.

A. If I'm not mistaken, it just had to do with just general -- the conversation that was going on had to do with the orders going in and out and errors on orders and errors in shipping or assumed errors in shipping. It had to do with how they were --

*****

Page 748, testimony of Don Hatter:

Q. And the comment that you overheard regarding "dumb niggers," were you in the -- were you present at that time?

A. I was in an adjacent work area. I

wasn't in the direct conversation.

Q. Did you see the person who made the comment?

A. I heard the person who made the comment.

Q. You heard but you did not see?

A. No.

Q. Were there other people in that area?

A. I couldn't be -- I would assume. I mean, there are people working in there, yeah. I mean, it's the -- during the afternoon a lot of times, the -- once the shipping program...

*****

Page 767, 768, 769

MR. DIERKING: Your Honor, we'd like to introduce this into evidence, Respondent's Exhibit 46, which is a memo from Gloria Streeter to Jerry Smith?

JUDGE STEVENSON: Any objection?

MS. SCHELDRUP: I guess I would object on relevance. I don't see how this ties into the issue of terminations or --

MR. DIERKING: It bears on her standing.

JUDGE STEVENSON: Does the court reporter have a copy of it?

MR. DIERKING: I had submitted copies before, and it was rejected, so I'm assuming that she has two copies.

(Pause.)

JUDGE STEVENSON: Mr. Dierking, how do you contend this ties into your case?

MR. DIERKING: As to the standing of a participant in the alleged protected, concerted activity. This has direct relevance to Ms. Streeter's position in the company. It was in response to a request by Mr. Dierking as to what her goals with the company and her position. On line -- under short-term goals, the second line, it provides an indication as to what her role

was in the company.

JUDGE STEVENSON: "Advance to learn more about managing shipping, per se, to be taught how to be a manager." What does that -- I mean, how does that work into your case? I don't follow.

MR. DIERKING: My understanding is that managerial employees are not covered under the Act, and specifically those have exercise independent discretion in policy making, and so it would have to do with the quality of the alleged protected, concerted activity.

JUDGE STEVENSON: So in other words, are you saying that at the time of the petition Ms. Streeter was not an employee protected under the Act; she was a supervisor? Is that what you're saying?

MR. DIERKING: I'm saying based on the criteria that's been explained to me, that there is question as to her standing as a

protected employee, yes.

JUDGE STEVENSON: Assuming for the sake of argument only that she is a supervisor at the time of the petition and that this Respondent 46 would be in support of her supervisory status, how would that say anything about Crumbaker, Cunningham, Smith, and the other lady, what is that --

MR. DIERKING: I'm certainly not that knowledgeable in this area, but I would say it would tend to pollute the activity and to call into question whether or not indeed it was protected or concerted under the Act.

JUDGE STEVENSON: Well, I don't think that follows.

MR. DIERKING: There are specific provisions in the National Labor Relations Act prohibiting management's influence or participation in such activities.

JUDGE STEVENSON: I'll refuse Respond-

ent's 46 once again. I'm not going to -- I do not want to litigate the supervisory status of Gloria Streeter. Do you feel that's necessary from your point of view?

[Respondent's Exhibit Number 46 for identification was rejected.]

*****

Page 786, testimony of Gloria Streeter:

BY MR. DIERKING:

Q. Have you ever indicated to Mr. Dierking you felt that Dr. Crumbaker was racially biased towards you?

A. Yes.

Q. Can you tell the Judge why you would feel that way?

A. She -- from other employees. I've also overheard her saying a comment about black women, and I thought that was a --

Q. Can you tell us more about the comment? What did it have to do with?

A. About -- I was pregnant at the time,

and she made a comment about me and my pregnancy and a comment about black women being on assistance.

*****

Page 808-809:

MR. DIERKING: Your honor, we move to enter Respondent's Exhibit 46 into evidence as it directly relates to her position a shipping manager and establish dates at which that was discussed.

JUDGE STEVENSON: I did ask the question, but it was not the purpose of establishing supervisory status or anything of the sort. I don't feel -- sometimes I can legitimately be accused of opening the door on an issue, and I have changed my mind from time to time. I've sustained objections to my own questions from time to time, but in this case I don't feel there's any reason to change my mind on Respondent's 46, so I'll persist in my refusal of that

document.

[Repondent's Exhibit Number 46 for identification was rejected.]

Page 896, testimony of James R. Dierking:

*****

JUDGE STEVENSON: Will you stipulate to that, counsel, that page 3 is in the writing of --

MS. SCHELDRUP: Let me just verify. Yes, Your Honor. I've consulted with Mr. Crumbaker, and she states that this is in her handwriting.

JUDGE STEVENSON: All right. I'm going to admit into evidence as Respondent's Exhibit 8, page 3 of the --

MS. SCHELDRUP: Is he withdrawing 1, 2, 4, and 5?

JUDGE STEVENSON: Well, he's either withdrawing it or I'm refusing it, so one or the other.

THE WITNESS: I withdraw it and that was

just as to Exhibit 8.

JUDGE STEVENSON: Eight.

[Respondent's Exhibit Number 8, page 3 for identification was received into evidence.]

[Respondent's Exhibit Number 8, pages 1, 2, 4, and 5 for identification were withdrawn.]

Respondent's Exhibit 8 Heather Crumbaker's Separation Statement to the Oregon Employment Division:

*****

SEPARATION STATEMENT: DISCHARGE

Name Heather Crumbaker

Name of Employer: Liberty Nat. Products

*****

1. Why were you discharged? Please be as specific as possible. What did you do or fail to do that caused you to be discharged? What reasons did you employer give you when you were discharged?

He fired the whole senior sales staff. He is switching to lower cost of employees and no telemarketing but mail inquiries. The previous day all employees had signed a letter asking to be paid on time and I was the first to sign. He screamed at and verbally abused other employees -- but I was out sick the next day. I had been promised up to $12/hr but then he would not honor that later.

*****

APPENDIX E

EXCERPT FROM PETITION FOR REHEARING AND SUGGESTION FO REHEARING EN BANC OF PETITIONER, CROSS RESPONDENT LIBERTY NATURAL PRODUCTS

1. Liberty's Forms of 1st Amendment Expression Under Section 8(c) of the Act Were Permissible Where Employees' Petition "Entreated" Liberty to Take Action and The Employers Expressions to The Employees were Opinions or Predictions Reasonably Based in Fact.

This Court in its memorandum decision failed to apply the Ninth Circuit's test which recognizes that any employer may express opinions or predictions, reasonably based in fact. Such a prediction must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at." UAW v. N.L.R.B., supra, 834 F2d 816 at 820.

Liberty had raised its 1st amendment freedom of expression claim in NLRB proceedings and also to this Court. See, (App. 1) (Petitioner's Opening Brief, p.

39, 40-45).

The employer's § 8(c) 1st Amendment claims under the Act was not addressed by this Court in the context of the totality of the employer's conduct. UAW v. N.L.R.B., supra, 834 F2d at 820. For example, in considering the totality of circumstances, the Court did not acknowledge that valid nexus existed between the post-petition expressions of Liberty's president to the employees and the objective fact that Liberty had rules for employees to check in and out of the job. (Tr. 453, 524). Employees' use of work time and stopping production for their employee activities without checking out on the computer, at a time when Liberty's financial situation was deteriorating, presented Liberty's president with frustrating problems beyond his control.

*****

Here, there is a direct, unconditional abridgment of speech and the Decision fails to balance the Government's interests with employers' freedom of speech in telling employees about the employer's position while interviewing them concerning their petition and related concerted employee activities. American Communications Assn, C.I.O. v. Davis, NY 1950, 70 S.Ct. 674, 339 U.S. 382, 94 L.Ed. 925, rehearing den. 70 S.Ct. 1017, 339 U.S. 990, 94 L.Ed. 1391. Employers' rights of freedom of speech are protected against government inferences. Local No. 1, (ACA), Broadcast Emp. of International Broth. of Teamsters, Chauffers (sic), Warehousemen and Helpers of America v. International Broth. of Teamsters, Chauffers, Warehousemen and Helpers of America, D.C. Pa. 1976 (419) F.Supp. 263).